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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 195

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., CHESTNUT FARMS-CHEVY CHASE DAIRY COMPANY, ET AL., *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF AMICUS CURIAE, NATIONAL COOPERATIVE MILK PRODUCERS FEDERATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Subject Index.

	Page
Statement of the Case	1
Argument	
Summary of Argument	3
Point A	3
Point B	4
Point C	4
Conclusion	6

Table of Cases Cited.

H. P. Hood & Sons v. United States, 307 U. S. 588, 59 S. Ct. 1019	6
United States v. Hutcheson et al., 312 U. S. 219, 61 S. Ct. 463	4
United States v. Rock Royal Co-op. et al., 307 U. S. 533, 59 S. Ct. 993	6
United States v. The Borden Company, et al., U. S. Dist. Ct. N. D. Ill., No. 2088, Sept. 16, 1940	4
United States v. Borden Co., 308 U. S. 188, 60 S. Ct. 182	5

Statutes Cited.

Capper-Volstead Act of February 18, 1922, ~~H 2~~ 42 Stat. 388, 7 U. S. C. 291, 292	5
Agricultural Marketing Agreement Act, 7 U. S. C. 608 c (5) (A)	6

Miscellaneous.

Hearings, House Judiciary Committee on H. R. 7783, 66th Congress (Serial No. 7)	5
Hearings, Senate Judiciary Subcommittee on H. R. 2373, 67th Congress	5
59 Cong. Record pp. 7857, 8034, 8037	5
60 Cong. Record pp. 376, 377, 571	5
61 Cong. Record pp. 98, 424, 1032, 1034, 1041, 1042, 1043, 1044, 2281	5
62 Cong. Record pp. 2048, 2049, 2121, 2122, 2123, 2173, 2174, 2273, 2274, 2275, 2279	5

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To the Honorable the Supreme Court of the United States:

The National Cooperative Milk Producers Federation, as amicus curiae, respectfully states:

I.

STATEMENT OF THE CASE.

This case originated in the United States District Court for the District of Columbia by the return therein of an indictment charging petitioners with having conspired to suppress competition and restrain trade in the sale of milk in the Washington area (R. 6). Petitioner Maryland and

Virginia Milk Producers Association, Inc., is a cooperative association of dairymen and is engaged in the business of selling milk at wholesale for its producer members. The remaining petitioners are milk dealers who purchase milk from the cooperative and sell it at retail as fluid milk, or otherwise process it.

The District Court dismissed the indictment on the ground that it did not set forth sufficient facts to properly plead a conspiracy in violation of the Sherman Act. After an unsuccessful attempt to appeal directly to this court (*United States* v. *Maryland and Virginia Milk Producers Assn., Inc.*, 69 S. Ct. 35) the case was transferred to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals by a divided opinion (thus putting one district judge and one circuit judge on each side of the question) reversed the District Court and decided important questions of Federal law, which have not been, but should be, settled by this court. The opinion of the Court of Appeals is not yet reported but will be found at page 25 of the record.

The questions raised by the Court of Appeals involve among other things the right of cooperatives entitled to protection under the Capper-Volstead Act (1) to bargain collectively with milk dealers for the sale of the products of the cooperative and in connection with such bargaining to set the price which the cooperative will charge for its products, (2) to make such contracts and agreements as may be necessary to market the products of the cooperative, and (3) to use as a basis for pricing its products a system of classified use prices.

II.

ARGUMENT.

Summary of the Argument.

Point A. Amicus Curiae, National Cooperative Milk Producers Federation, is a national non-trading Federation of dairy cooperative associations engaged in the marketing of milk and dairy products and as such interested in the principles of law involved in this case.

Point B. The decision in this case, insofar as it bears on the rights and immunities of cooperative associations engaged in the marketing of milk or other agricultural products, affects many such cooperatives doing a large volume of business and thus indirectly affects the economy of the nation as a whole.

Point C. The issues raised by the decision of the Court of Appeals are important questions of Federal law, which have not been, but should be, settled by this Court.

Point A.

Amicus curiae, National Cooperative Milk Producers Federation, is an organization representing on a nationwide scale producers of milk who market their products through cooperatives. Approximately one-fifth of the milk sold from farms in the United States is marketed through cooperatives which are members or submembers of the Federation. Many of these cooperatives market fluid milk wholesale in large metropolitan areas. Petitioner Maryland and Virginia Milk Producers Association, Inc., is a member of the Federation. The principles of law established in this case, bearing as they do upon the rights and immunities of such cooperatives under the antitrust laws, are of direct concern to the Federation and its members.

Point B.

The decision of the Court of Appeals affects an important industry, namely, the cooperative marketing of agricultural products by producers. A Department of Agriculture Release dated August 19, 1949 shows a total dollar-volume of business transacted by farmers marketing cooperatives for the 1947-48 season of approximately 6.8 billion dollars, with dairy products accounting for approximately 1.9 billion of this total.

The decision below creates confusion and uncertainty which, until settled by this Court, must necessarily result in decreased efficiency in the operation of such cooperatives and in consequent ill effect upon the economy of the nation as a whole.

Point C.

The important questions of Federal law raised by the Court of Appeals have not been, but should be, settled by this Court, and this should be done at the earliest opportunity. Numerous prosecutions have been commenced against cooperatives, and others are likely to follow if the uncertainties raised in this case are not settled. The Department of Justice should be provided with a clear-cut guide to govern such prosecutions; and cooperatives should have the benefit of settled rules of law so that they may know definitely what their rights are.

The rights of labor under the antitrust laws have been defined and settled by this Court (*United States* v. *Hutcheson et al.*, 312 U. S. 219, 61 S. Ct. 463). The rights of cooperatives should be equally well defined and settled.

The consent decree in the Borden case (*United States* v. *The Borden Company et al.*, U. S. District Court N. D. Ill., No. 2088, entered Sept. 16, 1940), recognized the right of a cooperative to bargain collectively with milk dealers for the sale of the products of the cooperative and to set the price to be charged for its products as a result of such bargaining. The Court of Appeals has ruled in effect that all price fixing agreements are illegal, without making

proper exceptions for the right of cooperatives to fix the price of their own products through collective bargaining. The decision of the Supreme Court in the case of *United States* v. *Borden,* 308 U. S. 188, 60 S. Ct. 182, cited in the Court's opinion, while it refers specifically to the rights granted by Section 1 of the Capper-Volstead Act did not define such rights; that decision was a negative one setting forth what the cooperative could not do rather than what it could do.

The Capper-Volstead Act (7 U.S.C. Sec. 291, 42 Stat. 388) expressly authorizes cooperatives to make such agreements and contracts as may be necessary to market their products. It is necessary in the marketing of milk, a highly perishable commodity, for cooperatives to contract in advance for an assured outlet for the milk. This is frequently done by the use of full supply contracts with dealers.

The decision of the Court of Appeals casts a doubt on the validity of full supply contracts, even though they may have been entered into in good faith, if the result of such contracts is to foreclose competitors from any substantial market.

The history of the Act as contained in the hearings before the Congressional Committees (Hearings, House Judiciary Committee on H. R. 7783, 66th Congress (Serial No. 7); Hearings, Senate Judiciary Subcommittee on S. 845, 66th Congress; Hearings, Senate Judiciary Subcommittee on H. R. 2373, 67th Congress) and the debates in both houses of the Congress (59 Cong. Record pp. 7857, 8034, 8037; 60 Cong. Record pp. 376, 377, 571; 61 Cong. Record pp. 98, 424, 1032, 1034, 1041, 1042, 1043, 1044, 2281; 62 Cong. Record pp. 2048, 2049, 2121, 2122, 2123, 2173, 2174, 2273, 2274, 2275, 2279), clearly shows that it was the intent of Congress that there should be no criminal prosecution of marketing cooperatives for contracts or agreements made in carrying out their marketing operations as specifically authorized by said Act. The legislative history further shows that Section 2 of the Act was expressly intended

as a remedy, at least in the first instance, in case of restraints of trade or monopoly or attempted monopoly as a direct result of the activities specifically authorized in Section 1 of said Act.

The principle of pricing milk according to the use made of it has been in use for many years and was adopted and approved by Congress as a proper and efficient method for the pricing of milk in Federal milk marketing orders (7 U.S.C. Sec. 608c(5)(A)), and upheld by this Court in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 59 S. Ct. 1019; *United States* v. *Rock Royal Co-op. et al.*, 307 U. S. 533, 59 S. Ct. 993. This method of determining the price which a cooperative will charge for its milk is in common use both with and without Federal orders. The decision of the lower court raises serious questions as to the legality of such price classifications when not used in connection with Federal milk marketing orders.

CONCLUSION.

The Court properly can we believe, and we respectfully pray that it will, take this opportunity to define and settle the general principles of law here involved and thus end the uncertainty and confusion which otherwise will beset and retard cooperative marketing until such time as that is done.

Respectfully submitted,

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